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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 603

H. L. VERHAAGEN, JAMES E. CROSS, JR., C. F. GRIFFIN, S. R. BAZEMORE, A. H. CARROLL, WILLIAM C. ELLIS, and L. H. DUNN,
Appellants

v.

SHERWOOD REEDER, City Manager of the City of Norfolk; CALVIN H. DALBY, Director of Public Safety of the City of Norfolk; W. J. LEWIS, Chief of the Norfolk City Fire Department,and CITY OF NORFOLK, a municipal corporation,
Appellees

PETITION FOR RE-HEARING

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PETITION FOR RE-HEARING

Your petitioners, H. L. Verhaagen, James E. Cross, Jr., C. F. Griffin, S. R. Bazemore, A. H. Carroll, William C. Ellis, and L. H. Dunn, respectfully pray for re-hearing of the Order of this Court dated May 27, 1957, denying their petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BASIC FACTS

This is a suit by certain firemen who are associated with an organization known as the Norfolk Fire Fighters Association, Local 1214, affiliated with the International Association of Fire Fighters to restrain the City of Norfolk, Virginia, from carrying into effect a regulation of the Fire Division of the City of Norfolk prohibiting firemen from joining or retaining membership in any firemen's organization affiliated, or in anyway connected, with any organization outside of the Division of Fire of the City of Norfolk, Virginia.

ARGUMENT

Petitioners assign the following reasons for granting this petition:

1. Subsequent to the filing of the petition for a Writ of Certiorari, the Supreme Court of the United States decided the case of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423, on May 13, 1957. In that case, the Supreme Court of the United States remanded the case to the District Court with directions to retain it on the docket until the appellants had exhausted their remedies in the State Courts of Alabama. On the constitutional question whether the State of Alabama can exclude a government employee, working as a clerk in a state operated liquor store, from further public employment solely because of membership in a labor union, the District Court for the Northern District of Alabama, Southern Division, had dismissed the case with prejudice.

The issues in the case, it is submitted, are identical to the issues in the case of the *Government and Civic*

Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als, Docket No. 423, which the Supreme Court of the United States considered of such importance as to remand it to the District Court for retention on the docket for further consideration as to the constitutional questions raised therein. The only difference in the two cases is that the plaintiffs in this case are firemen and the plaintiff in the Alabama case is a clerk in the state operated liquor store.

The reasoning in the opinion of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423, as to the constitutional questions involved applies to the constitutional questions in this case and, it is submitted, amounts to intervening circumstances of substantial or controlling effect required by Rule 58 of this Court.

2. A substantial ground available to petitioners and not raised in the petition for a Writ of Certiorari is the privileges and immunities clause of the Fourteenth Amendment of the Unted States Constitution. The Fourteenth Amendment of the United States Constitution recites that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The First Amendment of the United States Constitution recites that Congress shall make no law abriding the right of the people peaceably to assemble.

In *Thomas v. Collins,* 323 U. S. 516, 539, the Court said:

> "Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm, . . . And the right either of the workmen or of unions under these conditions to assemble and

discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

In *Slochower v. Board of Higher Education,* 350 U. S. 551, 555, the Court said:

> "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authorities."

In *Wieman v. Updegraff,* 344 U. S. 183, 191, The Court stated:

> "For in United Public Workers, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass, or take any active part in missionary work.' 330 U. S. at 100. See also *In Re Summers,* 325 U. S. 561, 571 (1945). We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

The constitutional questions in this case are of great importance. The Supreme Court of the United

States has recognized this importance by vacating the Order of the United States District Court in the case of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423. In addition, the constitutional question of the right of the firemen peaceably to assemble, it is submitted, should be decide by this Court.

3. It is the petitioners' belief that to deny a Writ of Certiorari is error in the following respects:

(A) It denies to firemen the right peaceably to assemble.

(B) It holds the Norfolk Fire Fighters Association, Local 1214, as a union as a matter of law, when in fact (which is uncontradicted) and in law, it is not a union.

(C) It denies to the petitioners the privileges as guaranteed under the Ninth Amendment of the United States Constitution.

(D) It applies the rationale of the antiquated and feudalistic reasoning of discipline to an organization merely because they are firemen (when said firemen are specifically associated for their mutual benefit and are EXCLUDED from striking and bargaining for wages).

As to Item A:

It can be stated with accuracy that the right to peaceful assembly is unquestioned. (*Thomas v. Collins, supra*). Is the fact that they are firemen *eo nomine* "a grave and immediate danger"? The transcript and the record are without misapprenhension. It is simply this: There are a number of firemen associations in these

United States and Canada. In fact there are firemen associations in Virginia in the Cities of Newport News, Petersburg, Portsmouth, Richmond and Roanoke. Are not firemen possessed of the same privileges as members of the bar, nurses, and physicians?

There is no evidence of "grave and immediate danger."

As to Item B:

Cases cited by the appellees do not apply to the facts here. The petitioners *are not a union, legally speaking.* Why? Because they have no right to strike or to bargain collectively. In fact, the Constitution of the Association forbids the right to strike.

The brief of the City of Norfolk admits this and adds ah, that is the next step. This Court will not decide a case on "what will be", but on the record and facts.

Actually, we do not believe that this Court is troubled by this factual question, in view of the uncontradicted testimony on this point, as it is by the legal question.

As to Item C:

The Ninth Amendment to the Constitution states that there are certain unenumerated rights that are retained by the people which are the inherent natural rights of the individual.

In Patterson, *The Forgotten Ninth Amendment* (1955), it is said:

> "It might be said that the theory of individual inherent rights is a part of our unwritten Constitution, in the same manner in which portions of the unwritten English Constitution are recognized

and enforced. But we feel that it is much more than the unwritten Constitution; the individual inherent rights and liberties antedate and are above constitutions and may be called pre-constitutional rights.

"This idea has been aptly expressed in 16 C.J.S. page 578, paragraph 199, as follows:

'The Constitutions are not the sources of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect these rights, and have incorporated them into the organic law as a shield against unwarrantable interference by any department of governments.'

"John Adams, the second great President of the United States, assured the people as follows:

'You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.'

"In Gow vs. Bingham, 107 N.Y.S. 1011 (Supreme Court of New York), the court held that we possess certain rights which have their origin as natural rights independent of any express provision of law, and that constitutional provisions are not the sources of these rights. The right 'to be let alone' was one of the rights sustained by th court.

"In a relatively recent decision of the Supreme Court of Texas (Spann vs. City of Dallas, 111 Texas 350, 212 S.W. 513) this same confidence in natural rights is expressed:

'To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe

its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.'

"In City of Pineville vs. Marshall, 299 S.W. 1072, 222 Ky. 4, by the Court of Appeals of Kentucky, the court held that:

'While the Bill of Rights declares and secures certain inherent rights, it does not create them, nor does it license an individual to ignore and defy the correlative rights of other individuals or of society.'

* * * * * *

"It is no criticism of the Supreme Court of the United States that the Ninth Amendment has not been construed. The question has simply never been presented to that Court for review"....

* * * * * *

"(1) Opinions of the Supreme Court of the United States beginning with Eilenbecker vs. The District Court of Plymouth County, Iowa, 134 U. S. 131, 33 L. Ed. 801, definitely show that only the first eight amendments to the Constitution were intended to be narrowly construed as inhibitions upon the National Government. Since the decision of this case in 1890, the Supreme Court of the United States has abandoned the dust-covered dictum that the first ten Amendments to the Constitution were intended as restrictions upon the National Government, and now holds that only the first eight amendments were so intended. Since the decision of the Eilenbecker case, there has been no decision of the Supreme Court of the United States and no dictum which has adhered to the old text. The mechanical error in the case of Livingston vs. Moore definitely establishes that it is no precedent or authority for the narrow construction of the Ninth Amendment.

"Therefore, the Ninth Amendment is unshackled from its early erroneous classification and the cloud has been removed, and it is now ready for use any time our courts or our people may discover an unenumerated human right.

"(2) Our constitutions are not the sources of our liberties. In Calder vs. Bull, 3 Dallas 386, 1 L. Ed. 648, and in Savings and Loan Association v. Topeka, 87 U. S. 686, 22 L. Ed. 455, cited also in the next succeeding chapter, the Supreme Court of the United States has recognized the doctrine of inherent human rights which are entitled to protection against the legislative acts of the several states, even though such rights may be unenumerated in the Constitution of the United States. These cases proceed upon the theory that there are rights in every free government which are beyond the control of state governments. These cases recognized the doctrine of the implied reservation of individual rights. This is the doctrine of the Ninth Amendment. Although the decision of Calder vs. Bull has been questioned, these cases have been cited many times with approval, and we do not find any decision which has overruled or distinguished the holding in these cases.

"These decisions can be construed in no other way except to establish that inherent rights, whether enumerated in the Constitution of the United States or not, are entitled to protection, not only against the Federal Government, but also as against the government of the several States.

* * * * * *

"We either believe in inherent human rights, or we do not believe in them; if we believe in such inherent rights, then such rights must be protected against the unwarranted power of either the National or the State Governments, otherwise they

fail and cannot be classed as an inherent right at all.

* * * * * *

"In Green vs. Frazier, 253 U. S. 233 (240), 64 L. Ed. 878 (881), 40 S. C. 499, The Supreme Court followed the opinion of Justice Miller, but has used the due process clause in the Fourteenth Amendment as the basis of its decision; however, Justice Miller, speaking for the Court in Savings and Loan Association vs. Topeka, made no mention whatsoever of the Fourteenth Amendment or any other amendment, or any portion of the Constitution, but the Court's decision was based solely upon the existence of certain fundamental rights which were beyond the control of the State.

* * * * * *

"At the time of the adoption of the Constitution it was common practice in several of the States that a person convicted of crime should be branded with a branding iron as an outward proof of his iniquity. No court would tolerate such a practice at this time, even though it was not considered cruel and unusual punishment at the time of the adoption of the Constitution.

"At the time of the founding of this Government, there was still wide-spread belief in witchcraft, and statutes of some of the States punished its practice. After a hundred and sixty-five years of enlightment, would we now tolerate the punishment of any individual for witchcraft?

* * * * * *

". . . We do not believe that it was ever intended that the science of the law should become so fixed and archaic, while all other sciences may go forward in the discovery of truth and may utilize it wherever it is found. We should not attempt to harness our rights to a civilization as it

existed one hundred and sixty-five years ago, and it was not the intention of the framers of the Bill of Rights that we should do so.

* * * * * *

"Some of the rights may now be making their appearance.

"The right of privacy may be such a right. If there is such a right, it is difficult to classify it under any right that is enumerated in the Constitution. This is a right which is of comparatively recent recognition. Some courts call it a fundamental right. While the courts seem to feel that it should exist, there is a great timidity and lack of forthrightness in the protection of this right, because its existence is not to be found in the written and enumerated law.

"There are many questions surrounding our labor problems that might appropriately come under the classification of rights of natural endowment. Do men have a natural or inherent right to strike? Does an employer have the right or privilege to choose those whom he desires as employees, or can such employer be forced to employ against his will? Is there a fundamental right to work?"

CERTIFICATE OF SERVICE

I, Louis B. Fine, counsel for petitioners, do hereby certify that the foregoing petition for re-hearing filed in this case is presented in good faith and not for delay.

LOUIS B. FINE
Counsel for Petitioners

As to Item D:

The hereinabove discussions for A, B, and C are applicable. In such a case as this civilization and society in a democratic form of government will permit firemen to associate with each other *after duty*.

CONCLUSION

For the foregoing reasons, the petitioners believe that this Honorable Court, even if it should adhere to its present result, may be desirous of having its opinion and expression on the subject for posterity. This case is a test case, upon which many other cases must rely (and for which other municipalities may enact similar orders of severance by an individual; *e.g.* such as the Fire Division). In some ways, it is a case of first impression, and the decision, however rendered, will constitute, a land mark in Constitutional law and a judicial precedent of the highest importance.

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